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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

JESSIE A. KILPATRICK,
Petitioner,

against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

Ex parte JESSIE A. KILPATRICK,
Petitioner.

No. 233
Miscellaneous.
Summary
Docket.

RESPONDENT'S SUPPLEMENTAL BRIEF

This case now stands for argument under the following order of this Court entered December 20, 1948:

> "This case is assigned for hearing on the motion for leave to file petition for a writ of mandamus or certiorari and the case is transferred to the summary docket."

This brief for respondent supplements our opposing brief dated December 3, 1948, and is in answer to the brief of petitioner dated January 13, 1949.

History and Status of Litigation

Petitioner Kilpatrick, a yard employee of respondent The Texas and Pacific Railway Company, was involved in a serious accident on November 20, 1946, at Big Spring,

exas. As the result he lost both legs. Petitioner at the me was a resident of Big Spring. The eyewitnesses to accident, the physicians who treated the petitioner, and early all the other witnesses for both sides, reside in Big pring. The respondent Railway Company is a citizen of exas* and has its main offices there. Its railroad lines e located only in Texas, Arkansas and Louisiana.

In December 1946 petitioner filed suit under the Fedral Employers' Liability Act in the United States District ourt for the Southern District of New York, where reondent maintains an office for the purpose of soliciting assenger and freight traffic.

On motion of respondent, the New York action was smissed on July 16, 1947, by order of Judge Caffey (72 Supp. 635) on the ground that respondent was not "doing usiness" in the Southern District of New York and could ot be served there.

On September 3, 1947, petitioner appealed to the Court Appeals for the Second Circuit from Judge Caffey's smissal of his New York action.

A few days later, on September 12, 1947, petitioner ommenced an identical action in the United States Disict Court for the Northern District of Texas, in which ig Spring is located. Respondent promptly answered in e Texas action; and during December 1947 a number depositions for use in the Texas action were taken by

*The Texas and Pacific Railway Company was incorporated Act of Congress in 1871. Its charter, as amended February 9, 23 (C. 66, Laws of 1923, 42 Stat. 1223) provides:

> "That the Texas and Pacific Railway Company, for the purposes of all actions at law by or against it, real, personal, or mixed, and all suits in equity, shall be deemed a citizen of the State of Texas and an inhabitant of the County of Dallas, in said State: * * *."

both sides (eight witnesses for the plaintiff and three for the defendant).

On March 4, 1948, the Court of Appeals for the Second Circuit handed down its opinion (166 F. (2d) 788) reversing Judge Caffey and holding that the respondent Railway Company was "doing business" in New York and was subject to service there.

Immediately following that opinion, petitioner moved to dismiss his action in Texas. When the District Court refused to dismiss, petitioner appealed to the Court of Appeals for the Fifth Circuit and also applied to that Court for a writ of prohibition. His application for a writ of prohibition was denied by the Fifth Circuit on April 13, 1948 (*In re Kilpatrick*, 167 F. (2d) 471).

On September 9, 1948, petitioner filed in this Court a petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit and for a writ of prohibition to the District Court for the Northern District of Texas (No. 275, Miscellaneous No. 119). That application is still undetermined.

On September 24, 1948, petitioner applied to Mr. Justice Black for a stay of trial in the Texas action. By arrangement with counsel, no formal stay was issued, but further proceedings in Texas have been held in abeyance to await the ruling of this Court.

On October 11, 1948, this Court denied the respondent Railway's petition for certiorari (No. 72) to review the decision of the Second Circuit on the question whether respondent is "doing business" in New York.

On October 27, 1948, petitioner moved in the Southern District of New York for a preference in the trial of his New York action. Respondent made a cross-motion, pur-

suant to Section 1404(a) of the newly enacted Judicial Code [28 U. S. C. A. 1404(a)], for an order transferring the New York action to the United States District Court for the Northern District of Texas.

On November 12 and 17, 1948, Judge Knox filed two memorandum opinions (appearing at pp. i and ii of the Appendix to petitioner's motion papers here) denying petitioner's motion for preference and granting respondent's cross-motion for a transfer of the action to Texas. He followed these memorandum opinions with an order of transfer dated November 22, 1948 (p. iii of Appendix to petitioner's motion papers here).

On November 24, 1948, petitioner filed in this Court a motion for leave to file a petition for writ of mandamus or certiorari to direct Judge Knox

> "to nullify his order of November 22, 1948, transferring this cause out of the Southern District of New York to the Northern District of Texas".

The present hearing is on that motion.

On the merits of petitioner's present motion, the only question is as to the meaning and application of §1404(a) of Title 28, United States Code. This supplemental brief is confined to that question.

The preliminary questions whether this Court has jurisdiction to issue a writ of mandamus or certiorari in this case, and if so, whether this Court should exercise its discretion to issue such a writ, are discussed at pp. 7-13 of our brief of December 3, 1948.

Summary of Argument

Section 1404(a) of Title 28, United States Code, reads:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer *any civil action* to any other district or division where it might have been brought".

Petitioner contends that an indefinite number of unexpressed exceptions—including one covering cases such as his own—must somehow be judicially read into those simple words. When confronted with an unequivocal statement by the authors of the section that it was drafted to specifically include Federal Employers' Liability Act cases, petitioner is forced to the position (a) that the authors of the section did not mean what they said, (b) that their views are immaterial and (c) that Congress in some way intended to do something different from what the authors meant.

We submit that the language of the statute is plain and unambiguous, and that it means just what it says. There is no inconsistency between the statutes involved, and no basis for the argument against implied repeals. Any doubts as to the application of § 1404(a) are set at rest by the Reviser's note, which shows that the section was drafted in its present inclusive form with the specific intention

(a) of including Federal Employers' Liability Act cases,

(b) of giving the district courts power to deal in particular cases with any possible inequitable results that might arise from the decision of this Court in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941).

For nearly three years before the enactment of the section, Congress had full information as to its purport. In the light of that information Congress adopted the language proposed. Its considered declaration of policy, which accords with the natural and simple meaning of the language, should be followed.

POINT I.

THERE IS NO INCONSISTENCY BETWEEN § 1404(a) OF THE JUDICIAL CODE AND § 6 OF THE FEDERAL EMPLOYERS' LIABILITY ACT, AND HENCE NO BASIS FOR APPLICATION OF THE PRESUMPTION AGAINST IMPLIED REPEALS.

Section 6 of the Federal Employers' Liability Act, as amended in 1910 (45 U. S. C. 56), provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

Petitioner contends in substance that the so-called "specific language" of this section is inconsistent with the so-called "general language" of § 1404(a) of the Judicial Code, that it must be presumed that the "general language" of the later statute was not intended to repeal the "specific language" of the earlier one, and that therefore an implied exception for Federal Employers' Liability Act cases must be read into § 1404(a). Alternatively phrased, his contention is that § 6 of the Federal Employers' Liability Act fills the entire field of venue for actions arising under that Act, leaving nothing upon which § 1404(a) can operate.

This argument is without merit. Properly interpreted, there is no inconsistency between the two sections. They are in *pari materia* and should be read together according to their natural meaning as a harmonious whole.

It may be quite true, as petitioner points out, that prior to the enactment of the Judicial Code in 1948, it had been established by this Court that the choice of forums given to plaintiff by the Federal Employers' Liability Act filled the entire field of venue under that Act and could not be frustrated for reasons of convenience or expense. It was on that premise that a majority of this Court in *Baltimore and Ohio Railroad Company* v. *Kepner*, 314 U. S. 44 (1941), held that a state court at the residence of the plaintiff could not enjoin him from prosecuting an action in a federal court of another state. But Mr. Justice Reed, speaking for the majority in that case, and commenting upon the possible result of the Court's decision, added (314 U. S., at p. 54):

> "If it is deemed unjust, the remedy is legislative * * *."

Congress has now supplied a legislative remedy in § 1404(a), which provides that in a specific case where the interests of justice and the convenience of parties and witnesses are shown to require it, an appropriate transfer may be made of "any civil action". It cannot be denied that an action brought under the Federal Employers' Liability Act is a "civil action". Thus, the field of venue in actions under that Act is now occupied by both § 6 and § 1404(a).

There is no inconsistency between the two sections. The privilege of bringing suit afforded by § 6 has not been abridged or destroyed. That section, as before, permits the plaintiff to sue:

(i) in the district where the defendant resides,

(ii) in the district where the cause of action arose,

(iii) in any district where the defendant is doing business.

The wide choice of forums thus given to a plaintiff remains completely unimpaired. § 1404(a) merely provides that if in a particular case a particular plaintiff exercises his choice in a manner inconsistent with the interests of justice, the district court shall have power to deal with the situation—not by dismissal or injunction, but by a simple order of transfer. Rightly considered, indeed, the situation is the exact opposite of what petitioner contends. His claim is (i) that § 6 is an earlier specific statute, (ii) that § 1404(a) is a subsequent general statute, and (iii) that therefore the earlier specific statute must prevail. With much more reason it may be said (i) that § 6 is a general statute dealing with all Federal Employers' Liability Act cases, and (ii) that § 1404(a) is a subsequent specific statute dealing only with those cases where hardship and inconvenience are established. Full effect can be given to both, and the intention of Congress can be fully carried out, if we read the two statutes together as providing simply that a plaintiff may bring his suit originally in any of the districts specified under § 6, subject to the right of the trial court to order transfer under § 1404(a) where the need for transfer is affirmatively established.

Section 6 states that "an action may be brought" in any of the districts specified. It does not require that the action, though properly "brought", must remain there regardless of all other circumstances. A majority of this Court in the *Kepner* case felt that, in the absence of legislative authorization, the case must remain where it was "brought". Sec-

tion 1404(a) now fills the gap by authorizing the district court, in the exercise of a sound discretion, to transfer a particular case to another district or division where it might have been "brought" in the first instance. Such a transfer will only be made where the defendant sustains the burden of establishing to the satisfaction of the court that the transfer is required for the convenience of parties and witnesses, *and* in the interest of justice. The facts of the present case well exemplify the desirability of giving the district court such discretion.

The decision of a motion for transfer will, of course, be made, as Judge Maris recently pointed out *Schoen v. Mountain Producers Corporation*, 170 F. (2d) 707, 715, note 20 [C. C. A. 3, 1948]), in the light of the rules for the application of the doctrine of *forum non conveniens* laid down by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947) and *Koster v. American Lumbermans Mutual Casualty Co.*, 330 U. S. 518 (1947).

Consequently, any suggestions that § 6 and § 1404(a) are conflicting, or that § 1404(a) "repeals" § 6, are absurd. Rather, the two statutes are complementary. Both together now "fill the entire field of venue" in regard to actions under the Federal Employers' Liability Act. Each has its place, and each should be given due effect.

POINT II.

THE WORDS "ANY CIVIL ACTION" IN § 1404(a) EMBRACE CIVIL ACTIONS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Petitioner argues that the words "any civil action" in Section 1404(a) were intended to apply only to those civil actions referred to in Chapter 87 of the Code.

In the first place, this argument runs directly counter to the express declaration of Congress itself. Congress has specifically provided in § 33 of Public Law 773* that the location of a particular section in the Code furnishes no basis for inferences of legislative construction. That section provides:

> "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in Section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title".

Even a superficial analysis of the Code itself further demonstrates the unsoundness of petitioner's contention.

The phrase "any civil action" is used in many other sections of the Code outside Chapter 87 (*e.g.* § 1335, § 1336, § 1337, § 1338, § 1339, § 1340, § 1343, § 1344, § 1346, § 1347, § 1348, § 1349, § 1350, § 1351, § 1353, § 1357, § 1441, §1446). The derivation of this phrase is given by the Reviser in his notes to each of these sections, and to the sections in Chapter 87 where the phrase is used, in substantially the same language. Typical is the note to § 1351:

> "Words 'civil action' were substituted for 'suits', and 'all suits and proceedings' in view of rule 2 of the Federal Rules of Civil Procedure."

Similarly, in his note to § 1394, which is in Chapter 87 governing venue, the Reviser's note reads as follows:

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*By "Public Law 773" we refer to the Act of June 25, 1948, C. 646, 62 Stat. The whole new Title 28 of the United States Code forms Section 1 of this Act. The remaining sections (2 to 39) are miscellaneous provisions, dealing, *inter alia*, with amendments, definitions, etc.

> "Words 'Any civil action' were substituted for 'All proceedings' in view of rule 2 of the Federal Rules of Civil Procedure."

Rule 2 of the Federal Rules of Civil Procedure specifies:

> "There shall be one form of action to be known as 'civil action' ".

The Advisory Committee notes to Rule 2 state in part as follows:

> "2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules."

One further illustration that the phrase "any civil action" in § 1404(a) embraces all civil actions as the term is used in Rule 2 of the Federal Rules of Civil Procedure is found in Amendment No. 29 proposed by the Senate Judiciary Committee on June 9, 1948. As passed by the House of Representatives, subsection (b) of § 1402 referred to "Any tort claim action." The proposed change made by the Senate and enacted into law was to strike out "tort claim action" after "any", and insert the words "civil action on a tort claim." The following explanation was given (S. R. 1559, 80th Cong. 2d Sess., p. 7):

> "This amendment is designed to bring the style of language of this section, which is incorporated directly from the Federal Tort Claims Act, into harmony with that of the revision which has elsewhere uniformly followed the Federal Rules of Civil Procedure in using the term 'civil action' to apply to all such actions."

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Consequently, it is obvious that the phrase "any civil action" was intended to embrace all claims for relief falling within the confines of civil jurisdiction, whether at law or in equity.

The language of § 1404(a) is clear, direct and unambiguous. It applies to "any civil action" without exception. In contrast, § 1445(a) specifically excludes cases arising under the Federal Employers' Liability Act from the operation of Chapter § 89 governing removal of cases from state to federal courts. In other parts of the Code where Congress intended not to have a particular provision apply to a certain class of cases, or certain types of claims, specific exceptions were made from the generic phraseology. For instance, in Chapter 171, entitled "Tort Claims Procedure," § 2680 lists twelve distinct types of claims which are excluded from the operation of that chapter.

Even in Chapter 87, where § 1404(a) is found, actions under the Federal Employers' Liability Act are specifically exempted from the operation of § 1391(b)—the "general" venue statute otherwise operative—by the phrase "except as otherwise provided by law". § 1391(b) provides:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *except as otherwise provided by law.*"

In this same connection it must be noted that subdivision (c) of § 1391 extends the definition of corporate "residence" for venue purposes to any district in which a corporation "is incorporated or licensed to do business or *is doing business*", thus directly overruling this Court's old decision in *In re Keasbey and Mattison Company*, 160 U. S. 221 (1895) where it was held that a corporation was only a

"resident" for venue purposes of the state of its incorporation (see *Cummer-Graham Co. v. Straight Side Basket Corp.*, 136 F. (2d) 828 (C. C. A. 9, 1943); *Moss v. Atlantic Coast Line R. Co.*, 149 F. (2d) 701 (C. C. A. 2, 1945); *cf. Suttle v. Reich Bros. Construction Co.*, 333 U. S. 163, 166 [cases collected, note 7] (1948); and discussion in 3 *Moore's Federal Practice* [*Second Edition*], § 19.04, p. 2135-6).

Even with this basic change of substantive law by § 1391(c), if the words "*except as otherwise provided by law*" had not been included in § 1391(b), the venue of Federal Employers' Liability Act cases would now be governed by that section. Consequently, the right of an injured employee to sue an interstate carrier in the district "in which the cause of action arose" would have been taken away.

Yet, the provisions of § 1391(c) put all other foreign corporations in the same venue position as interstate railroads sued under the Federal Employers' Liability Act, with the exception that the railroad may also be sued in the district "in which the cause of action arose" under § 6. This legislative extension of forums in actions against corporations (other than Federal Employers' Liability Act cases) indicates that Congress intended to make the venue of other cases practically co-extensive with the venue provided in § 6 of the Federal Employers' Liability Act. In view of this, there was an obvious need for a statute such as § 1404(a) to provide a means of correcting the inequity of foreseeable oppressive and burdensome suits resulting from this extension.

In view of the foregoing, it is clear that Judge Rayfiel in *Pascarella v. New York Central R. Co.*, 81 F. Supp. 95

(E. D. N. Y. 1948) fell into serious error in holding that the phrase "any civil action" in § 1404(a) refers only to those civil actions enumerated under Chapter 87 of the Code (p. 97). The *Pascarella* case, together with a companion case by the same judge (*Di Giovanni* v. *Baltimore & Ohio R. Co.*, unreported), are the only decisions which we have found holding that § 1404(a) has no application to a civil action under the Federal Employers' Liability Act. At least ten other district court decisions* have reached the opposite conclusion.

POINT III.

THE REVISER'S NOTE TO § 1404(a) SHOWS THAT THE SECTION WAS SPECIFICALLY INTENDED TO EMBRACE FEDERAL EMPLOYERS' LIABILITY ACT CASES.

The opinions of those who were active in drafting §1404(a) will of course be considered by this Court as "highly relevant and material evidence" of legislative intent (*White* v. *Winchester Country Club*, 315 U. S. 32, 41 [1942]; *Shapiro* v. *United States*, 335 U. S. 1, 12 [1948]). Realizing that fact, petitioner attempts at some length in his supplemental brief to explain away the reference to *Balti-*

Hayes v. *Chicago, Rock Island & Pacific R. Co.*, 79 F. Supp. 821 (D. Minn., 1948); *Collett* v. *Louisville & Nashville R. Co.* (E. D. Ill., 1948 [unreported]); *White* v. *Thompson*, 80 F. Supp. 411 (N. D. Ill., 1948); *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 80 F. Supp. 745 (S. D. N. Y., 1948); *Richter* v. *Chicago, Rock Island & Pacific R. Co.*, 80 F. Supp. 971 (E. D. Mo., 1948); *Lindgren* v. *Union Pacific R. Co.* (N. D. Ill., 1948 [unreported]); *Vore* v. *Union Pacific R. Co.* (N. D. Ill., 1948 [unreported]); *Hade* v. *Chicago & Northwestern Ry. Co.* (N. D. Ill., 1948 [unreported]); *Scott* v. *New York Central R. Co.* (N. D. Ill., 1948 [unreported]).

more & Ohio R. Co. v. Kepner, 314 U. S. 44 (1941) in the Reviser's note to that section. The *Kepner* case is cited by the Reviser "As an example of the need of such a provision."

In our brief filed December 3, 1948 (pp. 3-7) we demonstrated that the history of the Reviser's note shows, beyond any doubt, that §1404(a) was specifically drafted to give a district court the discretion to transfer a Federal Employers' Liability Act case.

Its origin stems from a memorandum written by Professor James William Moore to W. W. Barron, who was employed by the former House Committee on Revision of the Laws to do the actual drafting. Professor Moore, concededly one of the foremost authorities in this country on federal practice and procedure, was retained, together with Judge Alexander Holtzoff, United States District Judge for the District of Columbia, as a special consultant to the Revision Staff of the Judicial Code. As Professor Moore stated at hearings on the Revised Code (*Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong. 1st Sess.*, on H. R. 1600 and H. R. 2055, March 7, 1947, p. 25):

> "My chief function was to advise on matters of Federal jurisdiction, practice, and other problems related thereto. I have no financial interest in the enactment of the proposed revision."

On March 7, 1945, Professor Moore wrote to Mr. Barron proposing statutory recognition of the doctrine of *forum non conveniens* and provision for transfer to a more convenient forum. He went on to note:

> "In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the *Kepner* case, 314 U. S.

14, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue."

That the Reviser adopted Professor Moore's opinion is proved by the fact that a few months later § 1404(a) appeared in the Second Draft of the Code, together with the following Reviser's note:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Petitioner is wrong in asserting in his supplemental brief (p. 13, note 23) that the Reviser's note to § 1404(a) remained unchanged from October 30, 1945 to the date of enactment. The fact is that when the first part of the Revised Code was first submitted to the Committee on Revision of the Laws of the House of Representatives on October 30, 1945, the language of the Reviser's note to § 1404(a) was identical with the note in the Second Draft quoted above (*Revision of Federal Judicial Code [Preliminary*

Draft], *October 30, 1945*, pp. 273-4 (). The note was changed slightly between that time and April 25, 1947, when House Report No. 308 was printed. Thus, it cannot be questioned that nearly three years prior to the final passage of the Revised Code, the attention of Congress was specifically drawn to the fact that §1404(a) was new and was drafted with Federal Employers' Liability Act cases in mind, in accordance with Professor Moore's memorandum to the Reviser.

To show the continuity between Professor Moore's memorandum of March 7, 1945 and the final text of the Reviser's note to §1404(a), it may be noted that Professor Moore's erroneous spelling of "Employer's," instead of "Employers'" (see historical note to 45 U. S. C. § 51), has been carried over into the final Reviser's note.*

In view of the foregoing, Judge Rayfiel was clearly wrong when he said in *Pascarella* v. *New York Central*,

*In an article entitled "The Inconvenient Federal Forum", 60 Harvard Law Review, 908, 933 (1947), the Reviser's note receives this comment:

> "If the pending proposal for the revision of the Judicial Code is adopted, it will go further to establish the doctrine of *forum non conveniens* on the second basis suggested—trial convenience—than any court could go. Section 1404(a) of the pending bill provides: 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' The committee report states that this provision 'was drafted in accordance with the doctrine of *forum non conveniens*,' and cites *Baltimore & Ohio R.R.* v. *Kepner* 'as an example of the need of such a provision.'"

This Court, in *United States* v. *National City Lines*, decided prior to the enactment of § 1404(a), referred with approval to this article (334 U. S. at p. 589, note 35).

81 F. Supp. 95, 97 (E. D. N. Y., 1948) that the "mere reference" in the Reviser's note to the *Kepner* case was no evidence of legislative intent. As pointed out above, the rule of the *Kepner* case and the suggested legislative correction of the resulting inequities were called to the attention of Congress as early as October 30, 1945.

POINT IV.

THERE IS NO SUBSTANCE TO PETITIONER'S ARGUMENT THAT THE PLAIN MEANING OF § 1404(a) SHOULD BE REJECTED BECAUSE IT IS "CONTROVERSIAL."

Petitioner argues in his supplemental brief that what "Congress had authorized and believed it was passing upon was an expert revision and codification" [p. 8], and that, therefore, the Court cannot presume that Congress intended to change the "highly controversial field of private rights between railroads and injured employees" by the enactment of § 1404(a).

The speciousness of this argument may be first demonstrated by the fact that the Revised Judicial Code does make a great number of important changes in substantive and procedural law. We have noted above the important extension of venue against corporations made in § 1391(c). The procedure for the removal of cases is completely altered in §§ 1441-50. Section 2283, as the Reviser's note expressly states, is intended to overturn the rule laid down in *Toucey v. New York Life Insurance Company*, 314 U. S. 118 (1942). The list of other major innovations wrought by the Code could be continued *ad infinitum*, as a study of the Reviser's notes will show.

In House Report 308, dated April 25, 1947, favorably reporting the revised code to the floor of the House of Representatives, it was noted that minor changes had been made in the provisions regulating the venue of district courts "in order to clarify ambiguities or to reconcile conflicts". These changes are reflected in the Reviser's notes under sections 1391-1406. (H. R. 308, 80th Cong., 1st Sess., p. 6).

But, says petitioner, the changes intended to be made by Congress were only of a "non-controversial" kind, and the field of private rights between railroads and injured railroad employees was "highly controversial". In support of this thesis, petitioner points to the fact that the Jennings Bill (H. R. 1639, 80th Congress; H. R. 242 and H. R. 6345, 79th Congress) only passed the House of Representatives by a vote of 203 to 188, with 38 members not voting (93 Cong. Rec. 9193-4), and that the bill never reached the floor of the Senate.

The Jennings Bill and its failure of passage are wholly irrelevant to the interpretation of § 1404(a) of the Judicial Code. The Jennings Bill and § 1404(a) were drafted with entirely different purposes in mind and have nothing in common. The Jennings Bill deals solely with venue. § 1404(a) deals not with venue but with transfer. There is nothing inconsistent in the passage of § 1404(a) and the failure of passage of the Jennings Bill, and nothing in that failure which would require this Court to distort the plain words of 1404(a).

The Jennings Bill proposed to amend Section 6 of the Federal Employers' Liability Act by eliminating the broad power of the plaintiff to select the forum in which the action

would be tried. It then proceeded to amend Section 51 of the old Judicial Code (28 U. S. C. A. § 112), as follows:

> "A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a District Court of the United States or in a State Court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose:
>
> "Provided, that if the defendant cannot be served with process issuing out of any of the Courts aforementioned, then and only then, the action may be brought in a District Court of the United States, or in a State Court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action."

First, it is to be noted that the Jennings Bill repealed the venue provisions of § 6 of the Federal Employers' Liability Act and specifically limited the venue of actions to the district (i) in which the cause of action arose, or (ii) in which the person suffering death or injury resided, at the time it arose—unless process could not be served upon the defendant in either of those districts. Only in that event could the defendant be sued in any district where it did business.

The purpose of the bill was stated to be "to eliminate ambulance chasing and racketeering primarily in the matter of employers' liability suits under the Federal Employers' Liability Act" (93 Cong. Rec. 9178). A reading of the entire debate on the bill shows that there was no real controversy regarding this legislative aim (93 Cong. Rec. 9100-

9108, 9178-9194). The controversy arose as to the efficacy of the bill to accomplish this aim, and as to whether it did not go much too far. Debate particularly arose as to the following matters:

1. The bill embraced not only actions under the Federal Employers' Liability Act but also all other actions against railroads for wrongful death or personal injuries. Although no testimony had been adduced at the hearings regarding the improper solicitation or "transportation" of negligence cases other than those arising under the Federal Employers' Liability Act, the bill applied equally to such diverse plaintiffs as passengers, casual bystanders on railroad property and motorists involved in grade-crossing accidents.

2. The bill merely limited the venue of actions against interstate common carriers by rail. It did not purport to touch the venue of actions against interstate common carriers by bus, vessel or airplane.

3. The bill went so far as to regulate the venue in state court actions against railroads arising, not under federal statute, but under common law. On this score there was a serious question of its constitutionality.

4. The bill discriminated as between actions for wrongful death or personal injuries and actions for property damage. In actions for property damage, a plaintiff could sue in any district where the defendant railroad could be served. In actions for death or personal injuries, a plaintiff could only sue in the districts prescribed by the bill.

5. In cases covered by the bill, where the defendant railroad was incorporated in a state other than the

state where the accident occurred or the plaintiff resided, the railroad could not even be sued in the state of its incorporation, unless jurisdiction could not be obtained in either of the other specified districts.

6. In an action for wrongful death, an administrator could not sue in the district where he resided but might be forced to go to the district where "the person suffering death or injury resided at the time it arose."

To summarize, there was serious question in the House of Representatives whether the entire legal basis for the venue of all personal injury actions against railroads should be upset and confused merely in order to drive out some racketeers who were soliciting and transporting employee actions under the Federal Employers' Liability Act. Yet, it was generally recognized that the racket had become acute because of this Court's opinions in *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941) and *Miles v. Illinois Central R. Co.*, 315 U. S. 698 (1942), and that the resulting abuses needed correction. That correction has been supplied by § 1404(a).

In the last analysis, the Jennings Bill is completely irrelevant to the question whether § 1404(a) includes Federal Employers' Liability Act cases, except to show that the "temper of legislative opinion" was not adverse to correcting the abuses which had developed as a result of this Court's decisions in the *Kepner* and *Miles* cases.

As Judge Kaufman in the Southern District of New York said on this very point in *Nunn v. Chicago, Milwaukee, St. P. & P. R. Co.*, 80 F. Supp. 745, 748 (1948)

"Why the Jennings Bill was not enacted seems immaterial, but it is entirely possible that Congress felt such a law unnecessary for the very reason that such change as was deemed desirable would follow from Section 1404(a) of the new Code."

If there is any room for inference it is only reasonable to infer that the Senate Judiciary Committee, which was considering the new Judicial Code and the Jennings Bill at the same time, believed that the Jennings Bill not only was unwise as going too far but also was unnecessary for the reason that the abuses of improperly solicited and "transported" Federal Employers' Liability Act litigation would be effectively corrected—as the Reviser's note plainly indicated—by the enactment of § 1404(a).

Conclusion

1. Petitioner's motion for leave to file a petition for writ of mandamus or certiorari should be denied.

2. If the motion for leave to file is granted, the petition itself should be denied.

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Respectfully submitted.

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